IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 797

SOUTHERN PACIFIC COMPANY, a corporation,
Appellant,
vs.
CITY OF LOS ANGELES, a Municipal Corporation, J. C. MONNING, General Manager of the Building and Safety Department of the City of Los Angeles; LYALL A. PARDEE, City Engineer of the City of Los Angeles; and DOE I through DOE XX, inclusive,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

The appellee argues that this appeal should be dismissed first, because the judgment rests upon an adequate state ground and second, because the appeal does not present a substantial federal question. It is submitted by appellant

that neither of said reasons is applicable to the enactment sustained by the judgment in question.

The "reasonable minds" test is raised by the appellee in support of its first point in which it is claimed that the lower court judgment rests upon an adequate non-federal basis. It cannot be denied that where the principal point in question is the validity of legislative classification (as in the case of *Euclid v. Ambler Realty Company,* 272 U.S. 365 quoted on page 6 of the Motion to Dismiss) or is the reasonableness of legislative action, then debatable questions as to reasonableness should be for the legislature to decide and not for the courts. However, where as in this case the legislation clearly violates a right guaranteed by the Constitution this "reasonable minds" tests cannot sustain the police power enactment. In 16 C.J.S. Constitutional Law, §196, p. 946 it is stated:

"The exercise of the police power is under the control of the principles of constitutional law, and the police power must at all times be exercised with scrupulous regard for the constitutionally guaranteed rights." See also *Duckworth v. James,* C.A. Va., 267 Fed. 2d 224; cert. den. 361 U.S. 835; *Cooper v. Aaron,* 358 U.S. 1, 16; and *Buchanon v. Warley,* 245 U.S. 60, 81, stating at p. 74: ". . . it is equally well established that the police power broad as it is cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution"; Also see *Panhandle v. Highway Commission,* 294 US 613, 622.

Aside from any attack on the judgment sustaining the ordinance in question on the basis of unreasonable classification or as being invalid under the particular facts involved, it is submitted that the ordinance is invalid on its face as an unconstitutional taking of property without compensation and cannot therefore be sustained on any non-federal basis. In trying to justify the ordinance in ques-

tion, reliance has been placed upon the particular facts which indicate the portion of the property taken is small compared to the remaining holdings of the appellant. The inherent unfairness involved in sustaining a statute on this basis is made obvious by considering that nearly all other persons to whom the ordinance will apply will have much smaller holdings and they will sustain greater proportionate reduction of their property, but these persons who are unable to attack the ordinance for economic or other reason will be bound by the decision in this case. In addition "(I)t is the character of the invasion, not the amount of the damage resulting from it . . . that determines the question whether it is a taking." *Causby v. U.S.*, 328 U.S. 256, 266; *United States v. Cress*, 243 U.S. 316; and *R. J. Widen Company v. United States*, 357 F.2d 988, 993.

The appellee contends there is no substantial federal question presented because there is no taking of property but merely a zoning regulation permissible under the zoning power which is part of the police power. No attempt is made here to invalidate comprehensive zoning regulation and it is submitted that a reversal of the judgment herein would not have this result. However, what is requested is that the court take a close look at what the city has done in this case under the guise of zoning and determine whether this is a taking of property without compensation as required by the Fourteenth Amendment.

Zoning is basically a regulation of land use, prohibiting certain uses and allowing others. Such was the type of regulation found in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 relied on by the appellee. It restricts the uses to which certain land may be put, but still allows some use to the owner who retains control of his land. Compare this to the case now before this Honorable Court, where the owner loses control of his land and it is used by the general public for public purposes. It can hardly be denied that this

is more than a mere regulation of land use and is in effect a confiscatory taking of private property for public use without the provision for compensation required by the Constitution.

Except as hereinafter mentioned, all of the other cases cited by appellee along with the Ambler Realty Company case (272 U.S. 365) are clearly zoning regulation cases and therefore no more applicable to the instant case than is the Ambler Realty Co. Case. The only other cases are the Ayres (34 Cal. 2d 31), Billings Properties (144 Mont. 25) and Brous (304 N.Y. 164) cases cited on pages 9-10 of the Motion to Dismiss. The rule of these cases involving subdivisions was made necessary by the early subdivision abuses by land developers in this country which involved land fraud and the creation of new neighborhoods with built-in inadequate facilities. In these cases the developer is required to provide facilities made necessary by the proposed development. See the case of *Pioneer Trust & Sav. v. Mount Prospect,* 22 Ill. 2d 375, 176 NE 2d 799, which discusses the Ayres Case (34 Cal. 2d 31) and in referring to it on p. 380 of 22 Ill. 2d states: "(It) indicates that the Municipality may require the developer to provide the streets which are required by the activity within the subdivision but cannot require him to provide a major thoroughfare, the need for which stems from the total activity of the Community." See also *Exchange Nat. Bank v. Cook County,* 6 Ill. 2d 419, 129 NE 2d 1, 51 ALR 2d 312 (". . . and defendant county's contention that the questioned application of the ordinance could be justified as a measure to cut down any further increase in traffic on this arterial street in question was rejected. Although complainants proposed to sell the property to one intending to maintain a trucking terminal thereon, the court said that, even so, the increased traffic which might be attributable to such use was insignificant in view of the tremendous volume of

traffic already using the street on which the property fronted." 51 ALR 2d 312). The application of the foregoing to the instant case is clear, since the need for widening the street in question is obviously caused by the general growth of the city (see items (b) and (c) on p. 5 of Motion to Dismiss) and not by the proposed improvement.

Since the availability of alternatives has some bearing upon judicial review of legislative action, it is submitted that obvious and clearly constitutional alternatives to the ordinance in question are available to appellee such as general taxation, vehicle or gasoline taxes.

It is therefore submitted that the case cannot be dismissed on non-federal grounds and since the questions are substantial Probable Jurisdiction should be noted.

Respectfully submitted,

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Attorneys for Appellant.